FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 317.

CRITES, INCORPORATED,

Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, RICHARD SIMKINS AND GEORGE FLORENCE,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

RESPONDENTS' BRIEF.

CLARENCE D. LAYLIN,
16 E. Broad St., Columbus 15, Ohio,
Attorney for Respondents.

OSMER C. INGALLS,
9 E. Long St., Columbus 15, Ohio,
Of Counsel.

RODENFELS LAW PRINTING COMPANY, Columbus 15, Ohio.

INDEX.

Cases Cited.

INDEX.

Cases Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 317.

CRITES, INCORPORATED,

Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, RICHARD SIMKINS AND GEORGE FLORENCE,

Respondents.

RESPONDENTS' BRIEF.

STATEMENT.

In compliance with Rule 27, paragraph 4, respondents limit their statement to what they deem "necessary in correcting any inaccuracy or omission in the statement on the other side."

That portion of petitioner's statement which is headed "Judgment" and extends to and ends on page 4 of its brief on the merits is entirely accurate. Respondents conceive that several material inaccuracies and omissions characterize the petitioner's statement of "Facts," commencing on page 4, and the supposedly factual statements contained under the heading "Argument," commencing on page 16 thereof.

1. "The opinion of the Circuit Court of Appeals fails to show that, while these 11 farms were mortgaged to Prudential for $192,000, an offer to purchase these farms for $500,000 was made to Henry W. Crites by Edwin Jones, representing J. C. Penny of New York (R., 201)." (Petitioner's brief, p. 5, top.)

"The reason why Jones sought the cooperation of the receiver Simkins, rather than to bargain directly with the owner of the equity, may be traced to the fact that only two years previously Jones had made an offer for these same farms, on behalf of another client, of $500,000 and this offer had been rejected (R., 201-202)." (Petition for certiorari, p. 3.)

The record (201-202) does not show when this offer was made, closer than "a year or more" "prior to 1933"; and, in any view, this and all other courts of the country take notice of the notorious fact that generally accepted values of farm properties in Ohio and elsewhere shrank very greatly indeed, during the period of two years or more prior to the spring of 1933. If this prior offer of $500,000 is to be taken into account at all (and respond-

ent submits it should not be), it should be weighed with the fact that an offer of approximately $140,000 for the Madison county properties, here involved, was made to the Prudential after the commencement of foreclosure proceedings, but before the decree of foreclosure (R., 270-271), and that the lands were appraised for foreclosure sales at an aggregate value of approximately $244,000 (R., ...).

> 2. "On June 27, 1933, **unknown to the defendant Crites, Inc., or to the District Court, a contract** for the purchase of the 11 farms from Prudential was signed by Edwin Jones * * * (R., 61)." (Petitioner's brief on merits, p. 5 (bottom); emphasis ours.)
>
> "As afterwards learned by the petitioner, **when Prudential took its deficiency decree it already had in hand a contract for the sale of the farms—procured by the receiver Simkins before the foreclosure sales—at** $249,000 * * * (R., 288, 289, 61-3, 154-5).
>
> * * * * * * * * * *
>
> Simkins negotiated a written agreement with Prudential, contingent upon acquisition of title by Prudential at the impending foreclosure sale." (Petition for certiorari, p. 2; emphasis partly in the original and partly ours.)

When this statement, as made more definite in point of time by the brief than it had been in the petition, is read as a whole, it is incomplete, in the view of respondents, in that it does not in itself show that, while Jones' offer was in the hands of representatives of the Prudential shortly before the sale of July 1, 1933, that was after the entry of the decree pro confesso (May 2, 1933; R., 24-26).

The statement as a whole is inaccurate in the following material respects:

(a) There was no **contract** between Jones and Prudential on June 27, nor at any time prior to the sales. The written document referred to by petitioner (R., 61) was an **offer** by Jones to Prudential transmitted through Little at Circleville, Ohio, to Prudential's principal office at Newark, New Jersey (R., 63, 227), and there accepted by Prudential's officers on July 3, 1933, after the sales but before confirmation.

(b) The statement that Simkins had "negotiated" this contract or offer, contained in the petition for certiorari, omitted from the statement of facts in petitioner's brief on the merits, but drawn into the argument in that brief by innuendo (see pp. 18, 19) is inaccurate, as respondents conceive.

What Simkins had done in this connection was as follows:

On June 25, at Jones' request, Simkins met Jones at the Neil House, in Columbus, Ohio. Simkins induced Simerman (a "field man" for Prudential; R., 153, 242, 243) to call Little (farm loan manager of the Indiana branch of Prudential; R., 224, 225) by long-distance telephone (R., 287; see R., 319, 320, exhibit received, R., 294). On the next day Simkins had another conference with Simerman and Jones (R., 320). On June 27, Simkins went again at Jones' request to the Neil House in Columbus, to meet Sawyer, the attorney for Jones' principal; but Sawyer did not come (R., 287). Later in the

same day, the written offer was signed by Jones and witnessed by Simkins and Mrs. Lutz in Simkins' office in Circleville (R., 63, 193), and enclosed in a letter addressed to Little and signed by Simkins (R., 288; received, R., 289). This letter refers to statements made by Jones concerning his buyer, and to a telephone conference in which it is fairly inferable that Simkins participated. Simkins retained, after the lapse of time, no independent recollection of what transpired in his office (R., 282). It is certain that the written offer was not prepared there or by him (R., 193, 194, 210-212, incl., 280, 282, 288, 289) as shown by the testimony of Mrs. Lutz, a perfectly disinterested witness; and that it was not at the Neil House earlier in the day (R., 153, 210). The statement that Simkins negotiated the offer is also contrary to Jones' testimony (R., 210; see R., 205).

So, a more accurate statement of Simkins' connection with Jones' written offer would be that Simkins on Jones' behalf, persuaded Simerman to interest Little, and, with Simerman, vouched to Little for the responsibility of Jones and his buyer; and acted as a witness on the instrument and as a transmitting attorney for Jones. In a sense, these acts might be characterized as participation in Jones' negotiations; but the record is clear that Simkins had nothing to do with the terms of the offer.

(c) The statement that the offer dated June 27, 1933, was "unknown to the defendant, Crites, Inc., or to the District Court", is true as of June 27 and as of the date of the sale, July 1. The statement is incomplete in that it does not allude to the disclosure of the facts in open

hearing on confirmation, July 18, 1933. Indeed petitioner's statement of facts as a whole is incomplete with respect to information given to Crites, Inc., and to the District Court; notwithstanding which the case is argued extensively at page 17 to 23, inclusive, on the footing of non-disclosure.

The facts with respect to information given or available to the petitioner and the District Court will be subsequently stated herein.

3. The statement concerning the agreement between Simkins and Jones, commencing with the quotation from Jones' testimony at R., 206, on page 6 of petitioner's brief and extending to the end of the paragraph at the top of page 7 is accurate, but incomplete. Quite inaccurate, however, had been the corresponding statement of the petition for certiorari (page 2) viz.:

> "Simkins entered into a contract of employment with Jones under which Simkins was to procure the farms for Jones' principal, William Proctor, and Jones was to pay Simkins a share of his commissions."

The striking contrast between the measured statement of the brief and the looser and unwarranted language of the petition speaks for itself. Simkins did not know who Jones' principal was, when he entered into the agreement with Jones (R., 146, 150, 206, 209, 282); and the statement that Simkins was to have a share of Jones' commissions in the sense of a proportion or aliquot part, is wholly at variance with the evidence. (A similar statement, though eliminated from the "statement of

facts," in petitioner's brief, has unfortunately crept into the argument, at p. 18 of the brief.)

However, even the modified statement at pp. 6 and 7 of petitioner's brief, concerning Simkins' agreement with Jones, is incomplete, and consequently misleading, in that it is predicated entirely upon Jones' version (R., 207) and fails to take into account Simkins' version (R., 145, 146, 147). Jones said that the agreement was that Simkins was to help him in "acquiring this farm, and **any other services in the way of legal work**" (R., 207; emphasis ours). Simkins said in substance that the agreement was to assist Jones in closing a deal with Prudential if Prudential bought the farms in at foreclosure sale (R., 147). The master, who heard these witnesses and observed their demeanor, accepted Simkins' version (R., 78). His conclusion is supported by the fact that Jones himself testified positively that his principal, Proctor, had insisted on a general warranty deed from Prudential (R., 221) and had authorized him to buy the Madison county farms "only • • • as a whole" (R., 220).

So, respondents respectfully submit that in this court the fact respecting the scope of Simkins' original employment by Jones must be taken to be this:

That Simkins was to assist Jones as an attorney in dealing with Prudential for the Madison county farms as a unit, if Prudential should buy them all in, and in rendering other legal services to Jones in closing the deal, if made; to which may be added that actually Simkins assisted Jones in preliminary negotiations before Prudential acquired title to the farms, to the extent and

in the manner hereinabove stated. Also, that Simkins was to be paid by Jones for services, not to share in Jones' commissions, as such.

> 4. "The record does not show directly the amount agreed to be paid and ultimately paid by Proctor for the 11 farms, but the documentary tax stamps on the deed from Prudential to Proctor's nominee, Mary E. Johnston, indicated payment **by Proctor** of approximately $281,000 (R., 346); **presumably**, $249,106 net to Prudential, in accordance with the Jones-Prudential **contract** of June 27, 1933, and the difference of $31,894 to Jones. (See testimony of Jones about payments received by him from Proctor—R., 219.)" (Petitioner's brief, p. 7; emphasis ours.)

This statement is replete with inferences and suggestions which may or may not be true, viz.:

(a) That Mary E. Johnston was a **gratuitous** nominee of Proctor. This may have been the fact; yet for aught that appears, there may have been a valuable consideration moving from Mary E. Johnston to Proctor and entering into the amount of $281,000 indicated by the revenue stamps on the deed. She may have been a subvendee.

(b) That the revenue stamps correctly indicated the total amount actually paid.

(c) That **Proctor** alone paid $281,000.

(d) That Jones received a difference of $31,894. Jones did not so testify (R., 219). He did receive $15,000 and an additional amount which he did not remember.

Also, the amount received by Prudential on its resale was $249,106; this is not a "presumption"; it is estab-

lished by the evidence (R., 243, 244, 328); affidavit admitted, R., 310).

> 5. "In the opinion of the Circuit Court of Appeals it is stated as an absolute matter of fact that Proctor was not a prospective bidder at the marshal's sale (R., 389); and that although Jones was present at the marshal's sale he did not bid because he lacked authority to do so (R., 390). All that appears in the record in support of these assertions is the testimony of Jones himself that he was not authorized by his prospective purchaser to buy the 11 Madison county farms aggregating 4,844 acres, except as a whole (R., 220). However, Jones further testified that he never told Simkins and the Prudential Insurance Company he was only interested in buying the 4,844 acres as a unit (R., 221)."

This somewhat argumentative statement, in which a finding of fact by the Circuit Court of Appeals is sought to be impeached, is incomplete, and therefore also inaccurate. In the first place the special master thoroughly considered this question of fact and clearly stated his findings thereon as follows:

> "3. That the Proctor interests were not prospective buyers at the marshal's sale because of the fact that they demanded a warranty deed supported by the Prudential Insurance Company and for the whole tract.
>
> 4. That there is no substantial evidence to support an inference of controlled bidding or illegal conspiracy with reference thereto." (R., 104.)

In the second place, if this court should be disposed to go behind the findings of fact of the master (approved by the District Court) and the Circuit Court of Appeals the court will discover that Jones did not testify that he

had not told the Prudential Insurance Company he was only interested in buying the 11 farms as a unit (R., 221). He did say that he had never talked to Simkins about that; on which point Simkins contradicted Jones, as hereinbefore stated in paragraph 3 hereof. The whole course of dealing between the parties indicates that Jones was interested only in purchasing from Prudential, on behalf of his principal, should Prudential acquire the lands at the sales, and was therefore not a prospective bidder in his own behalf or for his principal, at the foreclosure sales; this conclusion does not depend solely upon the one statement alluded to by the petitioner.

6. "By force of the contract made with Prudential on June 27, 1933, under which he was bound to take the 11 farms from Prudential at a net price of $249,106 Jones had cut himself off as a possible bidder at the foreclosure sale. What Jones or Proctor might otherwise have done, if this contract had not been made, seems to rest entirely in argument and speculation."

This statement is entirely inaccurate. In the first place as pointed out under paragraph 2, supra, Jones had no contract with Prudential until after the sale, on July 3, 1933. In the ~~record place~~ what has just been stated concerning the facts of record shows that Jones was never a possible bidder at the foreclosure sale, nor was Proctor.

7. "In contrast with the dealings between Simkins, Jones and Prudential, the evidence shows that prior to the foreclosure sales another prospective purchaser wrote a letter to Prudential inquiring whether the Madison county farms could be purchased at private sale, but at a price unattractive to

> Prudential. In this instance, the answer was that Prudential did not own the property and was in no position to make any sale, that any sale would have to be worked out with the owner of the equity, Crites, Inc. (R., 271.)"

This argumentative statement is incomplete as hereinbefore indicated (p. 2).

8. The statement at page 8 of petitioner's brief concerning the amounts paid by Jones to Simkins is entirely correct, but incomplete. There should be added the statement that these payments were made by checks of Jones' father (R., 208); that the first of them was exacted by Simkins as a retaining fee or earnest money, and before Simkins or Jones knew that Jones' offer had been accepted (R., 280) and that, while Jones testifies (R., 219) that the amounts which he paid to Simkins came indirectly from money which Jones received from Proctor, most if not all of these payments were made before Jones had received any money from Proctor.

9. Apparently objecting to the Circuit Court of Appeals' description of Simkins' service to Jones as that of an attorney, petitioner, in its brief at pp. 8 and 9, refers again to Jones' version of the nature of the employment, on which respondents have previously commented (p. 7, supra); omitting, however, Jones' own words, which are:

> "Helping me in getting this farm, acquiring the farm, and any other services in the way of legal work,"

and which show that Jones himself conceived of Simkins' rule as "legal work."

Thereupon petitioner correctly states that Simkins did not examine the title or represent Proctor in the transaction. But it has never been claimed by or on behalf of Simkins, that he at any time represented Proctor in the transaction or did any work for Proctor. He was employed by Jones; and at the closing of the deal between Proctor, Jones and the Prudential, Simkins represented Jones and rendered services on his behalf (R., 217, 149-150; see also a letter from Simkins to Little, July 19, 1933; R., 248; exhibit received, R., 248); Among other services which Simkins rendered to Jones were these, as described in Simkins' language (R., 150):

> "He was in debt several places, and they attached his money, and different creditors of his tried to reach his money, and I telephone around for him".

So respondents submit that the fact of record is that Simkins agreed to represent and actually did represent Jones as an attorney; that the evidence repels any inference that he was a partner, joint venturer or associate broker with Jones; and that the findings and opinions of the lower tribunals on this point are correct and should not be disturbed.

The paragraph upon which comment has just been made concludes the statement of facts as it appears in petitioner's brief. As previously indicated, a number of factual statements occur in the course of the argument in the brief at pages 16 to 23, inclusive, which are not found in the statement of facts. Some of these may be interpreted as argumentative or inferential, especially those which discuss the supposed state of mind of the

parties and impute motives. Comment on all of such statement will be postponed. However, certain very specific statements of fact are made which require amplification and correction.

> 10. "The petitioner and the district judge were informed at the most, only that an unrevealed prospective purchaser wanted to buy (at an undisclosed price) the 11 farms as a unit, which it was assumed the court could not accomplish." (Petitioner's brief, p. 19.)
>
> "He (Simkins) knew—and knew that Prudential knew—that Proctor (through Jones) stood committed to buy the Madison county farms at a price substantially in excess of the entire mortgage indebtedness. He knew that defendants did not have this vital information; but even more, that if he made full disclosure to the defendants and to his co-receiver and to the court, that this would defeat his chances to share in Jones' commission or profit. He chose to take the course dictated by self-interest and kept the defendants in the dark."

Thus, arguments are built up on the factual premises of non-disclosure or incomplete disclosure on the part of Simkins, without any reference to the record evidence bearing upon these facts. Obviously petitioner's statement as to such very material facts is incomplete; and incompleteness, in such a matter, is the equivalent of inaccuracy.

The facts of record concerning the acquisition by Simkins of knowledge, and the disclosure of that knowledge to the court and to Crites, Inc., are as follows:

(a) At the time of Jones' first visit to Simkins, Simkins learned from him that Jones was acting as agent

for "Cincinnati parties" on whose behalf he was desirous of purchasing the 11 farms as a unit. He did not learn the name of Jones' principal nor how much the principal was willing to pay for the farms as a unit (R., 123, 146, 150, 206, 209, 281-282).

This information, being all that Simkins then knew as to Jones' objective, was communicated to Mr. Harlor of counsel for the petitioner and to District Judge Hough (R., 123, 146). Simkins does not say that he told counsel or the court that he had accepted employment from Jones; though he says that this fact "was no secret"; and that, "I may have told Judge Hough. I would not have hesitated in telling him." (R., 157.) Judge Hough's death made it impossible to clear up this question, if it be material.

(b) On or shortly prior to June 27 and approximately one week before the day set for the sales Simkins learned the price which was to be offered to Prudential ($249,106) and possibly the name or identity of Jones' principal (R., 123, 147, 148, 150, 275, 282, 283). He did not communicate this additional knowledge to the district judge or to counsel for Crites, Inc., prior to the sale. However, he was present in court (R., 286) when Mr. Harrison, one of the attorneys of record for the receivers and also attorney of record for Prudential as petitioner in the foreclosure proceedings and purchaser at the sale, advised Judge Hough of the offer and its later acceptance and of the price (R., 265). The occasion was the hearing on the motions for confirmation of the sales, of which counsel for Crites, Inc., had four days' notice (R., 28).

Whether or not counsel for the petitioner attended this hearing and heard Harrison's oral statement to the court is not disclosed; although Mr. Haffenberg, of counsel for the petitioner, read into the record at pages 227 and 228 a passage from Harrison's affidavit, hereinafter described, which would indicate that objections to the motion to "were suggested by reason of alleged commitments made by the plaintiff for the sale of certain of said properties, prior to public sale" from which it might be inferred that the present petitioners' counsel were then present and suggested such objections.

In any event, and despite Judge Hough's intervening death, there can be no doubt that Harrison did advise the judge, in open court, of Jones' offer; for at the suggestion of Judge Hough (R., 265) Harrison prepared and transmitted to the clerk (Exhibit A, admitted and printed at R., 266) with copy to the district judge (Exhibit B, R., 267, admitted 266) an affidavit to which was attached a complete copy of Jones' written offer dated June 27 and accepted at Newark, New Jersey, on July 3. This affidavit of Harrison was filed in the cause (R., 148) and was marked as Exhibit No. 4 in the hearing on the receivers' accounts, for the purpose of identification (R., 165); it was practically read into the record by Mr. Haffenberg of counsel for the petitioner (R., 227, 228) and was much discussed in colloquy during the hearing (R., 154). Apparently by inadvertence it was not offered or received as a part of the evidence in the hearing on the exceptions; but its purport is clear from the record; and a copy of the written offer, attached to the affidavit,

was attached to the exceptions to the accounts, filed July 24, 1937 (R., 50, 61). So there is documentary evidence supporting the statements of Harrison and Simkins; and it is clear that the District Court, before confirmation, was apprised at least of the identity of Jones; of the amount of his offer; of the fact that this amount was intended to include the landlord's interest in the growing crops; and of the fact that the offer was submitted prior to the sales. Nevertheless the sales were confirmed (R., 30).

Petitioner's brief is remarkable for its utter failure to allude to what transpired at confirmation. Its discussion is based upon the premise that the only revelation to the petitioner and the district judge was the earlier report of Simkins described in the preceding paragraph hereof.

In summary, it may be said that the only facts concerning the Jones transactions which may not have been seasonably communicated to counsel for Crites, Inc., or in open court when counsel were on notice, were Simkins' employment by Jones and the identity of Proctor. There is argument in petitioner's brief upon the implication that Simkins or Prudential or both knew, before confirmation, that Proctor was willing to pay $281,000 or some other sum greatly in excess of $249,000 for the farms; but there is no proof whatever to sustain this assumption.

Finally the respondent conceives that other material facts are disclosed by the record upon which no comment whatsoever is to be found in petitioner's brief, viz.:

11. District Judge Hough had exercised considerable supervision over the foreclosure proceedings. He had held up the decree and the sales for a year, hoping for

better times (R., 128). The receivers had gone to him for informal advice and directions with respect to the management of the farms, and Judge Hough had repeatedly suggested to them that they seek the advice of the agents of Prudential (R., 284); after the sale of the land on July 1 he advised the receivers as to the disposition by them of the wheat crops which had been harvested before the sale (R., 283, 284) and of the growing corn crop (R., 136).

As soon as the wheat crops were sold, which was April 14, 1934 (R., 39) the receivers made up separate accounts for each of the 22 farms involved in the receivership. They brought these accounts with supporting vouchers to the office of the district judge in Columbus and delivered the original accounts and the vouchers to Judge Hough (R., 68, 156, 198-199).

Judge Hough did not permit these accounts to be filed; instead he called Mr. Harrison, apparently in the latter's capacity as attorney for the Prudential, by telephone and asked him to come to the Judge's office in Columbus for a conference with the receivers and the court (R., 229). On May 7, 1934, this conference was held in Judge Hough's chambers. Judge Hough asked Mr. Harrison to take copies of the reports or accounts and have them audited, as "your client is chiefly interested here." He expressed the opinion that "if there is anything that is wrong it will be much simpler to have objections known in advance and get together with the receivers and work them out, rather than to set them down for exceptions." (R., 230).

At this time, of course, Judge Hough was fully apprised of the resale by Prudential to Mary E. Johnston.

Harrison took carbon copies and sent them to the home office of the Prudential for auditing; the auditors raised questions as to the expenses charged by the receivers; and these criticisms led to correspondence in an effort to compose the differences (R., 231). This delay continued until Judge Hough's untimely death. The master and the District Court properly took judicial notice that this event occurred in November, 1935; and that Judge Underwood, Judge Hough's successor, was not inducted until April 11, 1936 (R., 69). Further delays occurred and repeated efforts were made by the receivers and by Mr. Ingalls as their counsel to locate the original accounts and vouchers or to secure the copies from the Prudential; so that it was not until February, 1937, that new accounts were filed by the receivers (R., 69).

Informal notice of the filing of these accounts having been given to counsel for Crites, Inc. (R., 107) they attended the hearing set for June 2, 1937, on the accounts and then commenced a general and rather unsystematic inquiry which led to a reference to the master, several continuances of the hearing and to the filing of objections and exceptions in mid-hearing, as it were, on July 24, 1937 (R., 50). Many references to the somewhat confused record might be made to show the extent to which the recollections of all the witnesses had failed in the interval of time between the happening of the events inquired into and the dates of the hearings. Many of the issues of fact raised by the faulty recollection of wit-

nesses and suggested by the exceptions of the petitioner could have been resolved, had Crites, Inc., pursued its remedies during the two years after the sales, while Judge Hough was still living.

12. Not only was Crites, Inc., through its counsel, informed of the possibility of a sale of the Madison county farms as a unit to a prospective purchaser; not only was it chargeable with knowledge that such a sale had been made, at the time of confirmation on July 18, 1933; not only was the record of the deed from the Prudential to Mary E. Johnston available to petitioner after its recordation on August 21, 1933 (R., 312; exhibit admitted at same page); but the record shows that the petitioner actually did learn of the sale soon after it took place. At page 155 of the record Mr. Haffenberg, counsel for petitioner, makes the following statement:

> "I will take oath on this statement, that even Mr. Harrison advised us when we were trying to inquire about that farm that the purchaser was obtained after the Marshall's sale, and this all developed at a picnic. In other words we were put to sleep on the reliance of his statement, and it was not until some two years after that we developed any of the facts in connection with this matter."

This statement suggests inquiry by Crites, Inc., into the circumstances of the sale at a time when in all probability Judge Hough was still living, and when Mr. Harrison's affidavit and the attached exhibit were on file with the papers of the foreclosure action in the office of the clerk of the District Court.

Moreover Crites, Inc., knew from the beginning that Simkins was cognizant of the effort to purchase the lands

as a unit for he reported it to Mr. Harlor. At some undisclosed time prior to the filing of the receivers' reports petitioner's counsel learned definitely that Simkins had been compensated for assisting Jones (R., 123, 150, 151, 209). This information was elicited in the course of the trial of another action in the courts of Pickaway county, Ohio. For aught that appears Crites, Inc., then had full knowledge of all the essential facts on which the petitioner's claims are here predicated, long before it insfituted the proceedings which have come here, and perhaps during the lifetime of Judge Hough. The attitude and inaction of the petitioner is very frankly stated in the record by Mr. Haffenberg in his opening statement at pages 106-107:

> "If the court please, this report brings up a situation that I think has been held in abeyance three and one-half years * * *.
>
> "The foreclosure actions were instituted in February, 1932, the sale confirmed on July 18, 1933. **From that time until this we have been waiting** for the filing of these reports and the application for confirmation."

Bearing in mind that Crites, Inc., did not file any answer in the foreclosure cases setting up the nature of its claimed interest; that it acquiesced in the receiverships not only by yielding possession but also by permitting the receivers' tenants to use machinery which it claimed as its own property (R., 17); and that it then took no further interest in the proceedings, until the filing of the action of the receivers. The remark of the master at page 70 of the record is pertinent:

"The record clearly shows that Crites, Inc., had not been aggressive in the proceedings and that Judge Hough had considered the matter one between the receivers and the Prudential. Since the exceptors took no steps to compel an accounting or to assert their interest; it cannot be presumed that if an account had been made at an early date they might have found something upon which they might have acted to their own advantage. Where is the assertion of their interest in these cases, either in the form of answers or otherwise, prior to the filing of these exceptions? It is apparent that the exceptors took no open or active interest in these cases until after the filing of said accounts of February 19, 1937."

13. Petitioner claims that Simkins should be held accountable for "(c) the amount received by Prudential in excess of the decree indebtedness (or in the alternative) the amount by which the appraised value of the Madison county farms exceeded the indebtedness * * *" (petitioner's brief, p. 35). In summary argument (p. 13) petitioner states as a fact that "Prudential made a profit of $25,363.78 above the aggregate decree indebtedness" (petitioner's brief, p. 13). The alternative claim is not made specific in the brief; but in petitioner's exceptions (R., 345) it is stated that the appraised values of five of the Madison county farms exceeded the decreed debts and taxes in respect of those five farms by $14,311.72.

The figure $25,363.78 is inaccurate. Respondents suggest that it is impossible from the record to ascertain whether Prudential made any profit on the resale of the land to Proctor or Mary E. Johnston, much less the exact amount of any such supposed profit. The amount re-

ceived ($249,106) included the half interests in the corn crops growing on the Madison county farms, separately appraised and sold to Prudential by the receivers under orders of the court for an aggregate amount of $7,768.70 (R., 19) which amount was charged against Prudential's advancements to the receivers to pay taxes and insurance. Also to be charged against the gross difference between the decree indebtedness as at May 2, 1933, and the selling price would be the costs in the separate foreclosure actions, the marshal's cost at the sales and interest at the contract rate to the date of the sale if not to the date of the resale; also expenses of the resale including cost of title policies. Some of the figures are shown in the exhibit at R., 335, and explained by Harrison in the affidavit, R., 327 (received R., 310) supplementing and correcting his earlier testimony at R., 243-244. Harrison's computation shows a profit based on the judgments of $1,843.23. It is obvious, however, that the question of Prudential's profits must remain open until final accounting between the receivers and Prudential which has not yet been made.

The Agreement as to Fees.

Respondents find no fault with petitioner's statement of facts as to this matter at pages 9 and 10 of petitioner's brief.

SUMMARY OF ARGUMENT.

I.

Simkins Is Not Accountable as Receiver for the Compensation Which He Received as Jones' Attorney, Nor for Prudential's Profits on Resale, if Any, Nor for the Difference, if Any, Between the Decree Indebtedness and the Appraised Value of Some of the Farms, Nor for Jones' Profits or Commissions.

A. The principle that a fiduciary will not be permitted to retain a profit from any transaction with respect to which he is under a fiduciary duty does not apply because Simkins as receiver was under no fiduciary duty with respect to the foreclosure sales. The authorities listed at page 12 of petitioner's brief exemplify the rule which applies when such a fiduciary duty exists. The following authorities show that where such a duty does not exist the rule does not apply:

Twin Lick Oil Co. v. Marbury, 91 U. S., 587;
Allen v. Gillette, 127 U. S., 589;
Pewabic Mining Co. v. Mason, 145 U. S., 329;
Starkweather v. Jenner, 216 U. S., 524;
Turner v. Kirkwood, 49 Fed. (2d), 590;
Anderson v. Messinger (6 Cir.), 146 Fed., 929;
Reeves v. Crum, 97 Okla., 293, 225 P., 177;
Mercantile Trust Company v. Sunset Road Oil Co. (Calif.), 195 P., 466;
DeJarnett v. Peake (Calif.), 56 P., 467;
Beckman v. Emery-Thompson Machinery & Supply Co., 9 O. A., 275;
Steinbeck v. Bon Homme Mining Co., 152 Fed., 333.

B. Simkins as one receiver of rents and profits, appointed in a foreclosure proceeding conducted under the laws and customs of Ohio, had no control over the sales ordered by the court and held by the marshal and no duty to perform in connection therewith.

C. Neither in his capacity as receiver nor in any other capacity did Simkins influence the course of the foreclosure sales by preventing any bids or in any other way. Jones' offer to Prudential, pending at the time of the sales, did not prevent Jones from bidding on behalf of his principal at the sales nor from dealing with Crites, Inc., because Jones would not have pursued either course, under his instructions from his principal.

D. Simkins did not participate in any profits which Prudential may have made nor in Jones' profits, as such. He was paid compensation for his services in acting as Jones' attorney.

E. While Simkins, as receiver, was under no duty to transmit information acquired by him of facts which might influence the conduct of Crites, Inc., to the District Court for the benefit of all parties such information was actually so transmitted.

II.

Simkins Should Not Be Held Accountable Because of the Sales of the Receivers' Interest in the Growing Corn Crops.

A. The sales of the growing crops to Prudential by the receivers were ordered by the court with full knowledge of all material facts. Under such circumstances the principle against conflicting interests does not apply.

III.

Simkins Should Not Be Penalized in Respect of His Compensation as Receiver, by Reason of the Fee Pooling Understanding Between Ingalls and Himself.

A. The evidence shows that, after the lapse of three years, during which no question had been raised, Simkins and Ingalls had not divided any fees allowed by the court to either of them.

IV.

The Petitioner, Grites, Inc., Is Barred From Relief in Equity Through Exceptions to the Creditors' Accounts, by Its Own Laches.

A. Grites, Inc., admittedly delayed the pursuit of any remedy for its alleged wrongs until the belated filing of the substituted receivers' accounts. It acquired actual or constructive notice of all the essential acts at some undisclosed prior time. Judge Hough's intervening death and the failing recollection of witnesses manifestly disadvantaged the respondents at the hearing.

Hammond v. Hopkins, 143 U. S., 224;
Missouri & K. I. Railroad Company v. Edson, 224 Fed., 79.

ARGUMENT.

I.

Simkins' Fiduciary Obligations Did Not Prevent His Acceptance of Employment as Jones' Attorney.

The foreclosure proceedings here involved were conducted under and conformably to the laws and customs prevailing in the state of Ohio. The courts of that state adhere to what is sometimes called a modified common law title theory of a mortgage. **Kerr v. Lydecker**, 51 O. S., 240, and earlier decisions therein cited.

Foreclosures are, however, strictly regulated by statute in Ohio. Section 11588 of the General Code of Ohio, as in force at the times herein material, provided:

> "When a mortgage is foreclosed or a specific lien enforced, a sale of the property shall be ordered."

Other sections provide for the appointment of appraisers, among them Sections 11711, Ohio General Code, which governs the terms of sale and need not be herein quoted. While it has been held by the Sixth Circuit Court of Appeals that the Ohio statutes do not preclude a sale without appraisement under a power of sale contained in the mortgage or deed of trust (**Etna Coal and Iron Co. v. Marting Iron and Steel Co.**, 127 Fed., 32), yet this practice is rare in Ohio; and the mortgages herein involved contained no power of sale.

In these cases the appointment of appraisers was prayed for in the third cause of action in each petition

for foreclosure (R., 5) on the following grounds, which we abstract:

That the real estate was not being occupied by the mortgage debtors but was leased or tenanted to and by others;

That the mortgage debtors were in default and that the real estate was probably of a value inadequate to secure the debt;

That a petition in involuntary bankruptcy had been filed against one of the mortgage debtors and that the mortgage debtors had conveyed and assigned all of their property, real and personal, to Crites, Inc., and were insolvent or in immediate danger of insolvency.

That the appointment of a receiver forthwith

> "to take charge of the above described mortgaged premises, to rent and manage the same, collect the proceeds thereof and apply the same to taxes, assessments and otherwise, as this honorable court may direct pending judgment and sale",

was necessary in order to avoid irreparable injury to the petitioner in that the tenant years in the vicinity of the real estate began on March 1.

Pursuant to this prayer an order was entered appointing Simkins and Florence as co-receivers

> "to collect the rents and proceeds of the real estate described in the second cause of action in plaintiff's petition herein and/or to operate and manage said real estate through tenants, lessees, or otherwise, to rent and lease said real estate, to pay delinquent taxes and assessments and insurance premiums, to make such repairs as may be necessary to preserve the value of the premises and to produce normal income therefrom, and to do such other acts as may be from time to time ordered by the court." (R. 10.)

The same order fixed the bond of the co-receivers in 22 co-related cases at only $10,000 which further indicates the restricted scope of the receivers' duties and responsibilities. Respondents submit that it is obvious that the master, District Court and the Circuit Court of Appeals were entirely right in holding as did the Circuit Court of Appeals that the receivers "had no authority to dispose of the real estate; had nothing to do with bringing about the sale and no control over the manner in which it was carried on. They were not in any sense liquidating receivers."

The best the petitioner can do with this quite decisive holding of the lower courts is to say at page 16 of its brief,

> "We find no such exact divisibility of purpose in the orders of the District Court, but rather a single purpose to administer and liquidate the trust property in the manner most beneficial to all parties concerned."

In an attempt to support this erroneous analysis petitioner argues that the District Court consulted with one of the receivers as to deferring the sales; but it is admitted by the petitioner (petitioner's brief, p. 17) that there is no evidence to show that the receivers in anywise influenced the court's final decision in the matter.

The only transactions committed to the receivers herein were the leasing of the farms to tenants, the care of the buildings, etc., thereon, the securing and furnishing of seed for planting, the collection of the "rents"—payable in kind as shares of harvested crops—the maintenance of insurance on buildings, the payment of taxes and other

expenses incident to the nature of their control over the farms, and the keeping of proper accounts and records. In all these transactions, their fiduciary obligations extended primarily to the plaintiff, the Prudential, on whose behalf they had been vested with control, and indirectly to Crites, Inc. But the transactions involved in the foreclosure sales were completely outside the scope of their powers, either legal or factual, and of their responsibilities. The conclusions of the master and the Circuit Court of Appeals, as to the nature of the receivers' fiduciary obligations are, we submit, entirely correct.

The petitioners seek the benefit of the rule that a fiduciary will not be permitted to profit by dealing with the trust property.

There is indeed a salutary and well-established principle of equity to the effect that a fiduciary will not be permitted to profit by any transaction with respect to which he is under a fiduciary duty. The principle is absolute, applying whether or not there be fraud or concealment, and regardless of the fairness of the transaction. It admits of but one exception, viz., that a fiduciary who is an officer of the court may be authorized by the court to do what would otherwise be prohibited to him.

It is this principle which condemns a purchase by a fiduciary at a sale made by himself; but the principle, as applied to judicial and similar sales, is not limited narrowly to such a case, nor did the Circuit Court of Appeals suppose it to be so narrowly limited, as erroneously argued by the petitioner at page 16 of its brief. It extends its condemnation to all cases in which the fiduciary is charged with any responsibility or duty in bringing

about or influencing the course of the sale, even though the reception and acceptance of bids be conducted by another fiduciary or officer of court.

Many of the cases relied upon by the petitioner were decided upon this principle.

In **Jackson v. Smith**, 254 U. S., 586, Ambrose was liquidating receiver of a building association. One of the assets which it was his duty to collect was a note secured by a mortgage of real estate, with power of sale vested in a trustee. (As pointed out in opinion in **Reeves v. Crum**, 97 Okla., 293, Ambrose as receiver for the creditor secured by the mortgage, and under the practice prevailing in the District of Columbia with respect to sales under powers of sale, had the power to order the trustee to advertise and sell the property; the power to designate the time, place and conditions of sale; and to order a deed.) Ambrose, as receiver, requested the trustee to sell, and ultimately, with others, bought in the property for an amount insufficient to pay taxes and costs (in consequence of which Ambrose, as receiver, realized nothing) and soon after sold it at a profit. Mr. Justice Brandeis said (p. 588):

> "Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. **Baker v. Schofield**, 243 U. S., 114; **Robertson v. Chapman**, 152 U. S., 673, 681. To this end it was his duty to endeavor to have the land, when sold under the trust deed, bring the largest possible price. **J. H. Lane & Co. v. Maple Cotton Mill**, 232 Fed. Rep., 421."

Ambrose was surcharged because as receiver he had brought about the sale for the purpose of realizing upon

the note, and it was his duty to influence and control the sale.

In **Nugent v. Nugent** (1907), 2 Ch., 292 (affirmed (1908), 1 Ch. 546) one of four part-owners of a house was defendant in a partition suit, in which a sale was prayed. She was appointed receiver of the rents and profits. A mortgagee intervened and took an order authorizing the mortgagee to sell under her power of sale, by public auction. The defendant-receiver bought the house at the sale. The court would not permit her to retain it.

Swinfen-Eady, J., sitting in the chancerey division, stated the reason for the decision as follows:

> "A receiver appointed by the court cannot purchase property of which he is receiver without the sanction of the court. That question has arisen directly in Ireland in Alven v. Bond (1 Fl. & K., 196, 213).
>
> . . . . . .
>
> "Sir Michael O'Loghlen, M. R., said, '. . . I think that it would be very dangerous to allow a person, who has so much control over the property, as a receiver of the court must necessarily have, such opportunities of acquiring a knowledge of the circumstances and value of it, which may not be easily attained by others, **who may be, as in the present case, employed in the preparation of the rental to be used at the sale (which everyone knows to be one of the most important documents used or such an occasion)** to become the purchaser of the estate without the sanction or knowledge of the court . . . Very great powers are given to, and much confidence placed in this officer, who is placed in a situation which would enable him, if inclined to act dishonestly, **by reducing the rental or lettings made** by the court, or otherwise, to bring to a sale under very dis-

advantageous terms, the property confided to his care, and thus become the purchaser at an undervalue * * *.'

"The language of Sir Michael O'Loghlen, M. R., is of general application. It is based upon general principles, and applies equally to a case where the sale is not under a decree in the action, but is a sale by a mortgagee under a power of sale * * *." (Emphasis ours.)

So the reason for the rule in Ireland and England, that a receiver may not purchase at the mortgagee's sale under power, is that such sales, in those countries, are conducted without appraisement, though sometimes at public auction; and people there bid on rental income, where available, not on supposed selling value, as here; and the receiver owes a duty to furnish information to bidders at the sale. In Ohio, all foreclosure sales are upon official appraisement, and a receiver has no such duty or responsibility. Moreover, in **Nugent v. Nugent**, the receiver would have been under a duty to sell, had it not been for the interposition of the mortgagee.

In re Sheets Lumber Co. (La.), 27 Southern 809, liquidating receivers of the lumber company petitioned the court for an order to sell certain assets at public sale (other assets had already been sold by the receivers at private sale). The court ordered a sale by the sheriff.

One of the receivers bought certain real estate offered at this public sale. The court (Monroe, J.), said:

"He ought to have known that he could not buy that, or any other property belonging to the corporation, for which it was his duty to obtain the best price possible."

In that case the sheriff's sale was but one means of discharging the receivers' general duty to liquidate all the assets at the best price possible.

In **Baker v. Schofield**, 243 U. S., 114, cited by petitioner, a liquidating bank receiver sold to another a certain asset standing in his name as receiver. In an action by a successor receiver to impress a trust on the assets, both lower courts had found, on the evidence, that the first receiver's sale was colorable, and that the first assignee had purchased upon a secret trust for the receiver. This is a plain case for the application of the principle in its simplest form. The receiver both sold and bought. Attention is called to the controlling weight given by this court to the concurrent conclusions of fact of the District Court and the Circuit Court of Appeals (see 243 U. S. at p. 118). In the case at bar, the concurrent holdings of the two lower tribunals are determinative of many of the issues of fact, as will be hereinafter noted.

In **Donohue v. Quackenbush**, 62 Minn., 132, 75 Minn., 43, a receiver of land encumbered by the lien of a judgment against the defendant in the action, purchased the judgment, foreclosed its lien by agreement with defendant's wife, bought in the land at the execution sale, and resold it to another at a profit. He thus acquired an adverse interest in the land and profited by it. His assignee was compelled to account by the defendant in the action. The case, while quite dissimilar to the case at bar, is well within the general principle.

Cook v. Martin, 75 Ark., 40, does extend the principle beyond its true boundaries, and supports the petitioner's

contention. Apparently, it stands alone and is opposed by the weight of the decisions which we shall hereinafter cite. It may be worthy of note to observe however, that, on rehearing, the judgment was reversed on the principle of election of inconsistent remedies.

Shadewald v. White, 74 Minn., 208, the last of the cases cited by petitioner at page 12 of its brief, was decided on another principle; for in that case the whole foreclosure proceeding, including the appointment of the receiver, the management of the business and property and the ultimate sale, was in pursuance of a collusive agreement between the receiver and the principal stockholder of the mortgagor, and an actual fraud upon creditors and court alike.

In all of the foregoing cases which apply the principle as we have stated it (excepting **Cook v. Martin**, supra), the receiver or his assignee was held accountable because, as receiver, he was under some specific duty or responsibility to act, or participate in, or had some power to direct and control, the transaction out of which his profit was derived.

On the other hand, one who sustains a fiduciary relation to another is at liberty to undertake and profit from a transaction in which his interests are adverse to that other, when the fiduciary relation does not encompass the transaction. If this were not so, the consequences would be far-reaching indeed. From the numerous decisions which reflect this converse side of the principle respondents have selected a few which resemble the case at bar.

In this court the doctrine goes back at least as far as **Twin Lick Oil Co. v. Marbury**, 91 U. S., 587. In that case a director of a corporation lent money to it secured by a deed of trust conveying all of its assets to a trustee "with the usual power of sale in default of payment." While still a director, he caused the property to be sold under the deed and bought it in at the sale through an agent. Later the corporation filed a bill to impress a trust upon the corporate property in the hands of the director and for an accounting. The bill charged concealment of special knowledge concerning the value of the property and premises from individual shareholders and that the defendant had declared that he would purchase the property for the joint benefit of all. These averments were denied; and the court found on the evidence that there was no actual fraud or oppression.

Referring to the fiduciary obligations of the director, Mr. Justice Miller said:

> "That a director of a joint stock corporation occupies one of those fiduciary relations where his dealing with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality and which has received the clearest recognition in this court and in others * * *. The general doctrine, however, in regard to contracts of this class is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it" (pp. 588-589).

The learned justice then held that the original loan, having been entered into fairly, was a valid contract, and continued as follows:

> "If it be conceded that the contract • • • was valid, we see no principle on which the subsequent purchase under deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted."

Allen v. Gillette, 127 U. S., 589, was heard, according to the old equity practice, upon bill and answer, answer having been given under oath. The bill had charged fraud and concealment in fact, which the court held had been repelled by the answer. The defendant was one of three co-executors under a will authorizing them to administer the entire estate of the decedent including the real estate. The complaint was one of the devisees; she had mortgaged her interest in some of the lands of the estate. This mortgage had been foreclosed and that interest had been sold at judicial sale and purchased by the defendant. The object of the bill was to hold the defendant accountable as a trustee and permit the complainant to redeem. Mr. Justice Lamar said at pages 593-594:

> "It must be conceded that, as a general rule of equity jurisprudence, a trustee or person acting in a fiduciary character for the benefit of others cannot become a purchaser at his own sale, or acquire any interest therein without the express consent, or under a special permission given by a court of competent jurisdiction. The cases cited by counsel for appellant abundantly support this doctrine. It ap-

plies to executors and administrators who are not permitted to derive a personal benefit from the manner in which they transact the business or manage the assets of the estates intrusted to them; but whatever advantage is derived by them from a purchase at an undervalue is for the common benefit of the estate."

and again at pages 595 and 596:

"* * * the defendant occupies no relation of trust or confidence to the transaction. With no legal power over any of the contracting parties, with no right to interfere with the trustee, to whom full power by the deed is lawfully given to sell the incumbered interest at public auction, he has no trusteeship in regard to it, no duty to perform in respect to it. The debt itself, incurred by complainant, constitutes no part of the liabilities of the estate which he, as executor, represents. The sale, when made, touched that estate nowhere, did not diminish its assets in the least, nor withdrawn from it any lands, subject to the debts of creditors, and to the ultimate partition of the devisees and their assigns.

"There is nothing in the transaction, from its inception to its final consummation, that imposed upon the defendant any duty incompatible with his right as a purchaser at the sale.

"The principle that a trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring, and over which he could not have had control, is upheld by numerous decisions of this court and of other courts of this country. **Prevost v. Gratz**, 1 Pet. C. C., 364, 378; **Twin Lick Oil Co. v. Marbury**, 91 U. S., 587; **Chorpening's Appeal**, 32 Penn. St., 315; **Fisk v. Sarber**, 6 W. & S., 18.

"It is true that the rule upon this subject as stated by some text writers is more stringent than that stated in these cases. 1 Perry on Trusts, Section

205; Hill on Trustees, 250. We think, however, that the language employed by them does not present a thorough and perfect generalization of the essential principles pervading the decisions upon this subject. * * *"

Pewabic Mining Co. v. Mason, 145 U. S., 349, was an appeal from a confirmation of a sale ordered by a Circuit Court in proceedings for the liquidation of the assets of a mining corporation. The bill for dissolution had been filed by certain stockholders of the company to forestall a threatened sale of all of its assets to another company, approved by the majority of the shareholders. The sale was conducted by the master and certain of the complainants in the cause bid in the property. It was alleged that before so bidding these stockholders, who had brought about the sale, had devised with another company "a scheme to take the property (if bought) off their hands at a very large personal profit; and they did not disclose this fact to the court" nor to their fellow stockholders or other bidders at the sale (p. 352). So it was charged that the complainants were both buyers and sellers.

This court sustained the confirmation of the sale. Mr. Justice Brewer said, among other things:

"The English practice does not obtain in this country. A sale made by a special master under the directions of a court of chancery is not a sale made by either of the parties to a litigation or under his direction. The master is a representative of the court, as a marshal or sheriff is in an action at law. He is not under the control of either party; he is not the agent of either to make the sale. At such public judicial sale, either party as a rule may bid. **Rich-**

ards v. Holmes, 18 How., 143; **Smith v. Black**, 115 U. S., 308; **Allen v. Gillette**, 127 U. S., 589; **Smith v. Arnold**, 5 Mason, 414, 420. In that case Judge Story said: 'In sales directed by the court of chancery, the whole business is transacted by a public officer, under the guidance and superintendence of the court itself. Even after the sale is made, it is not final until a report is made to the court and it is approved and confirmed.'" (p. 361.)

In **Starkweath v. Jenner**, 216 U. S., 524, the complainant, the owner of unimproved land in Washington, D. C., formed a syndicate pursuant to which he conveyed the land to trustees with power of sale, in trust for contributors to a common development fund. The land was incumbered by mortgages. One of the mortgage debts matured and the mortgagee directed a sale by the trustee, pursuant to the method of foreclosure in vogue in the district. It was purchased by one of the members of the syndicate. Plaintiff sought to charge the purchaser as a trustee and alleged fraudulent collusion. This court found that there was no fraud and affirmed the Court of Appeals of the District of Columbia which had dismissed the bill. Mr. Justice Lurton said:

> "But it is plain that the principle which turns a co-tenant into a trustee who buys for himself a hostile outstanding title, can have no proper application to a public sale of the common property, either under legal process or a power in a trust deed. In such a situation, the sale not being in any wise the result of collusion nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public.
>
> "Even a trustee has been held competent to purchase the trust property at a judicial sale, which he has no interest in, nor any part in bringing about,

and which sale he in no way controls. **Twin Lick Oil Company v. Marbury**, 91 U. S., 587; **Allen v. Gillette**, 127 U. S., 589.

"But it is said that if there is no absolute prohibition upon one co-owner buying at an open sale of the common property to satisfy a mortgage or other incumbrance thereon, that at least the fiduciary character and common interest due to such a cotenancy require of one who buys the utmost fairness of conduct. Concede this. It is then said, that Jenner at the bidding held a power of attorney from three others of the syndicate members, by which he was to bid the property in for their mutual benefit at the lowest price possible, and at a price not exceeding $25,000. That he held this power of attorney and had undertaken to buy at as low a price as possible was not known to appellant and that this 'secret combination' as it is styled and designated, was a fraud upon him. * * *"

"* * * That sale was in February, 1898. This bill was filed in the spring of 1903. That appellant did not at the sale know that Jenner was buying for himself and certain other of the syndicate may be true, but he, confessedly, learned that fact when Jenner and his associates fell out and the fact came to light in a bill filed in December, 1898. At most, the sale was voidable, not void, and he who would complain must seasonably elect whether he will avoid it or not. **Twin Lick Oil Co. v. Marbury**, 91 U. S., 587.

"Appellant did not act with that degree of promptness which equity demands. He has slumbered over the question of whether he should elect to let Jenner hold on to his purchase or require him to give the benefit of his bargain to his co-tenants. A delay of not less than four years, during which there has been a large appreciation in the value of the property, is unreasonable. Two courts in succession have failed to find ground for relief, and we see no good reason

for reversing the decree from which the appellant has appealed." (pp. 528, 529, 530-531.)

In addition to the decision of the Circuit Court of Appeals, in this case, there are several others such as **Turner v. Kirkwood**, C. C. A. 10, 49 Fed. (2d), 590, fully discussed in petitioner's brief at pages 26 to 30, inclusive; **Anderson v. Messinger**, C. C. A. 6, 146 Fed., 939; and **Steinbeck v. Bon Homme Mining Company**, 152 Fed., 333. As to **Turner v. Kirkwood**, we agree with the counsel for petitioner in the statement that this and the other cases leave for determination the question as to whether, in relation to a judicial sale conducted by another, a receiver or like fiduciary who does not actually conduct the sale "has placed himself in a position where his personal interest is in conflict with his duty as a fiduciary."

On page 594 of the report of that case the court said:

> "The test is not whether the correlate has suffered an injury but whether there has been a clash between the personal interests and the duties of a receiver."

To which statement we presume to add this:

> "The test is not whether the receiver owes **some** duties to the "correlate" but whether he owes duties with respect to the particular transaction in which he is alleged to have acquired a personal interest."

Of the state cases, the most striking is **Reeves v. Crum**, 97 Okla., 293. In that case the trustee in bankruptcy of the mortgagor, representing other creditors of the mortgagor, just as Crites, Inc., purports to represent other creditors of the mortgagors in the case at bar, brought an action against the foreclosure receiver, the plaintiff,

an agent of the plaintiff, and others. The complaint charged that the receiver, together with the plaintiff and the plaintiff's agent, entered into an agreement with the third party defendants whereby in consideration of the payment of $3,000.00 the third party defendants would refrain from bidding at the foreclosure sale. A demurrer for insufficiency of facts was sustained.

It was urged in that case, as it is urged here, that the case of **Jackson v. Smith** was controlling. The Oklahoma court denied the applicability of **Jackson v. Smith**, and referring to Ambrose, the receiver, in **Jackson v. Smith**, said:

> "He occupied a position of confidence and trust toward the defunct association and its stockholders as thrust upon him a legal as well as a moral duty to obtain the best possible price for the property and to return the same to the treasury of the association for the benefit of the stockholders. The fiduciary relation of Ambrose the receiver to the association is clearly apparent, he having absolute power over the property of the association."

The court having denied that there was any similarity, in dealing with the sufficiency of the complaint before it, used this language:

> "Browder and his co-defendants occupied no such position toward the creditors of the bankrupt estate; his duty only being to collect rents and make an accounting to the court for the benefit of the Oklahoma Farm Mortgage Company. He possessed no power to direct the time, place or conditions of the sale, or to direct a deed to issue. The adequacy or inadquacy of the price obtained did not concern him in position as receiver for rents; he might have purchased the property and held it in his own name.

or acquired an interest therein by a partnership agreement with others and reaped whatever profits might arise from the transaction, without betraying any confidence or trust, as no confidence or trust was ever reposed in him by the trustee in bankruptcy."

In **DeJarnett v. Peake, Calif.**, 56 Pac., 467, a foreclosure receiver brought an action against the third party to recover a commission which the third party had agreed to pay the foreclosure receiver for acting as his agent in procuring an assignment of the note and mortgage in order that the third party might in that manner obtain the property. The court examined the evidence, found that there was no unfair dealing, held that there was no inconsistency in the receiver's position, and that he could recover the commission.

Other illustrative state cases are:

Mercantile Trust Company v. Sunset Road Oil Company, Calif., 195 Pac., 466;
Beckman v. Emery-Thompson Machinery & Supply Co., 9 Ohio App., 275.

Thus the authorities show that a transaction of the kind involved in the case at bar will be held voidable **per se** only if the receiver had control over the sale conducted by another officer or some duty to perform in connection therewith. It is true that such a transaction invites careful examination by the court, if questioned; and the record in this case shows that such examination was given by the master, the District Court, and the Circuit Court of Appeals. The record shows concurrent conclusions of fact favorable to the receiver Simkins. The triers of the facts have found that Simkins had

nothing whatever to do with the foreclosure sale as such; neither actively nor passively, according to these findings, did he influence their course. His connection was, not with the foreclosure sale, but with the resale by the successful bidder, Prudential to Jones, and through him to his principal. The other question suggested in argument by the petitioner is as to whether or not the negotiations leading up to that resale, which were commenced prior to the foreclosure sale, had the effect of preventing the ultimate purchaser from bidding at the foreclosure sale. The lower tribunals have found positively that it had not and could not have had such effect, as Col. Proctor was never a prospective bidder at the marshal's sale. This conclusion of fact is amply sustained in the record.

It is also argued by the petitioner that Simkins was a joint venturer with Jones, Prudential, Proctor, etc., and is to be held liable for the profits, if any, of all of these others under the rule of **Jackson v. Smith, supra.** That that decision in general is inapplicable here has already been argued; but the case at bar differs from **Jackson v. Smith** and from many of the other cases hereinbefore discussed in another respect, namely, in that Simkins, as found by the lower courts, served Jones as an attorney and was in no other sense a participant in whatever profits he may have made in connection with the resale. Furthermore, the record is clear and the lower tribunals have found that Simkins, in the questioned transaction, was in no sense serving Prudential. We have argued that Simkins should not be required to account for the fees which he received from Jones; but in any event, to require him to account for what

Jones may have received and for the hypothetical profit which may have accrued to Prudential on the resale, is, on the facts found below, extravagant and wholly unwarranted by **Jackson v. Smith** or any other authority.

Petitioner seems to argue that Simkins was wanting in candor and fair dealing in that he did not fully disclose what he knew concerning the proposed resale to the District Court or to the petitioner; and the suggestion, but butressed by any citations of authorities on the point, is that Simkins should be required to account on this footing even though, as we have argued, the rule which would subject a fiduciary to accountability, regardless of the fairness of the questioned transaction, does not apply.

In dealing with this question, if it is to be considered at all, it must be remembered that Crites, Inc., is the complaining party. It appears to be a corporation composed of some of Crites's principal unsecured creditors, to which Crites and his wife, the debtors, had conveyed all of their assets, including the equities of redemption in the several farms involved in the foreclosure proceedings. Being in possession in the sense of receiving the rentals and profits of the lands, it was made a party to each of the foreclosure proceedings; for a time it participated and cooperated in the action by lending machinery belonging to it to the farm tenants. Then seemingly it lost interest in the proceedings. It never was interested in the deficiency findings (the confirmation and distribution orders (R., 30) do not constitute judgments).

Prudential, on the other hand, was under its mortgage entitled to take the rents and profits (see paragraph 12 of petition for foreclosure, R., 5) and would, in any event, have been entitled to possession, after condition broken, under the law of Ohio. (See authorities cited in **Kerr v. Lydecker, supra.**) The receivers were appointed on its prayer and at its instance. Thus, on the uncontested allegations of the petition the receivership was primarily for Prudential's benefit. See **Hutchinson, Assignee, v. Straub**, 64 O. S., 413, holding that where the mortgage pledges the rents and profits, the mortgagee is entitled to them as against an assignee for the benefit of creditors. Judge Spear said at page 416:

> "Manifestly in equity the mortgagee had the right, by virtue of the stipulations in the mortgage, to sequester the rents, and the only question remaining is as to the manner of enforcing such right. Ordinarily the method would be by the appointment of a receiver auxiliary to a foreclosure suit. But why should that be held to be the only way?"

Here it will be remembered that at the time of the institution of the foreclosure proceedings, an involuntary petition in bankruptcy against H. M. Crites had been filed. Had the trustee in bankruptcy taken possession of these farms, he would of necessity have accounted to the Prudential for so much of the net rents and profits thereof as would be needed, after foreclosure sale, to satisfy the Prudential's claims.

The district judge took cognizance of this very practical aspect of the situation when he directed the receivers to cooperate with the representatives of Pru-

dential in the management of the farms, and when, at the time the accounts were tendered for filing, he remarked that the accounting was between the Prudential and the receivers and that no one else was interested in it.

Notwithstanding all this, the record shows and the lower tribunals have concurrently found that Simkins, when first approached by Jones, passed on all the information he then had (excepting the fact that he had agreed to help Jones) to the district judge and also directly to counsel for the petitioner. The record also shows, incontrovertibly, that additional facts, covering the particulars of Jones' offer to Prudential and its acceptance, were stated in open court at the time of the confirmation, of which petitioner had notice. Whether the district judge was then apprised of the identity of the purchaser does not appear and was not clearly recalled by the witnesses. If Judge Hough had been living at the time of the investigation that point might have been made clear.

So there is no substantial basis in the record and the concurrent conclusions of fact of the lower tribunals for petitioner's complaint here made that it was deprived by want of knowledge available to it, of an opportunity to protect its interests by seasonable objections (Petitioner's brief, pp. 19, 20). Its counsel were either present at the hearing on confirmation, or, having ample notice of it, they neglected to attend. At that time it was or would have been known to the petitioner at least that Jones, with Simkins as a witness had, prior to the marshal's sales, offered in writing to buy from Prudential, should it buy in the properties, at a price in excess of the

mortgage indebtedness; and this knowledge would have come from Simkins and the Prudential, as represented in the court on that occasion by Mr. Harrison. The petitioner could then, had it been so advised, have resisted the motions to confirm and moved to have the sales set aside in order "to give the petitioner an opportunity to bargain with the prospective purchaser."

Of course all this would have been futile in any event, as the Circuit Court of Appeals saw; for the concurrent conclusions of fact are that Proctor, Jones' principal, did not wish to deal with Crites, Inc., or with anyone other than Prudential, from which he desired a warranty deed for the farms as a whole. (R., 391.)

So we submit that the findings of the Circuit Court of Appeals, the master, and the District Court, to the effect that the interests of Crites, Inc., were in no wise prejudiced by anything that transpired, are amply supported by the evidence in the record and, as indicated by all the decisions of this court, are to be followed here.

II.

The Growing Crops.

Prudential, under orders of court, had advanced considerable sums to the receivers for the payment of current and delinquent taxes, insurance premiums, etc. (R., 11, 27, 42). The District Court, with full knowledge of the fact that the Prudential had agreed to resell the Madison county farms together with growing crops, had confirmed the marshal's sales to it. He had advised the receivers that their landlord's interest in the growing

crops belonged to and was to be accounted for by the receivers (R., 136). In this situation the receivers on October 2, 1933, applied for instructions as to the disposition of the growing corn crops and were ordered, authorized and directed to sell them to the plaintiff (Prudential) for prices stipulated in the several orders (R., 19) which the record shows were arrived at by valuations fixed by disinterested appraisers. Both receivers joined in this proceeding.

It is clear from the record that the district judge knew at this time that Simkins had had some connection with the transaction between Prudential and Jones, as his name appeared as that of a witness on the document which had been filed with the court; whether he knew more than that does not appear, and his lips are closed in death.

Respondents respectfully submit that under these circumstances this transaction, directly ordered by the court, comes within the exception recognized by all the cases which have been examined, viz., that where the transaction is authorized or approved by the court, a receiver may participate in it, though it involves dealing with the subject matter of the receivership. We need not repeat the citations of the cases which recognize this exception.

III.

The Agreement as to Fees Between Simkins and Ingalls.

The opinion and decision of the Circuit Court of Appeals in disallowing additional fees to counsel for the receivers without penalizing Simkins, the receiver, by ordering him to repay his receivers' fees, is criticized by the petitioner as "incongruous" (Brief, p. 15), for which petitioner professes to be at a loss to find any logical basis (p. 34).

It is true that the agreements as to fees did not come to light until the investigation and was not known to Judge Hough during his life, as found by the Circuit Court of Appeals (R., 392, 393). However, the Circuit Court of Appeals was here exercising a judicial discretion. The court evidently thought it sufficient ground for discrimination between Ingalls on the one hand and Simkins on the other hand that the record showed that Ingalls had actually divided his fee as attorney for the Prudential with Simkins, whereas Simkins, though no question had been raised, had not divided with anyone the compensation which had been allowed to him as receiver by the court. The matter is not one in which the petitioner has any interest (R., 393). It is a problem for the court of equity to determine what shall be done to "vindicate the proprieties." Respondents recognize that the issue as to the propriety of the disallowance of a part of Ingalls' fees is not before this court; they suggest, however, that the Circuit Court of Appeals has gone far enough in the matter.

IV.

The Petitioner's Laches and Acquiescence.

That equity rewards the diligent and not those who sleep on their rights is a fundamental maxim. We take it for granted that the principle thus expressed will be applied on exceptions seeking to surcharge the accounts of a receiver the same as it would be applied in a formal suit initiated by bill of complaint. In other words, in so far as by this means the petitioner seeks a recovery which it conceivably could have sought by another form of equitable proceeding, its equities are the same here as they would be in such other proceeding.

In certain of the cases previously cited equitable relief was denied to a complainant who with knowledge, actual or constructive, of the essential facts had delayed the presentation of his grievance to a judicial tribunal until intervening circumstances had so changed the position of his adversary as to put the latter at a disadvantage.

Twin Lick Oil Co. v. Marbury, supra;
Starkweather v. Jenner, supra.

The principle is a very familiar one. It was recognized by this court in the leading case of **Hammond v. Hopkins**, 143 U. S., 224, a case similar on its facts to the case at bar, wherein Mr. Justice Fuller said at pages 250 and 251:

> "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the

peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or there long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like. **Marsh v. Whitmore**, 21 Wall., 178; **Landsdale v. Smtih**, 106 U. S., 391; **Norris v. Haggin**, 136 U. S., 386; **Mackall v. Casilear**, 137 U. S., 556; **Hanner v. Moulton**, 138 U. S., 486.

The main contention here is that the sale of May 10, 1864, should be set aside as to the purchases by the trustees through Chapman, on the ground of constructive, coupled with actual, fraud.

Undoubtedly the doctrine is established that a trustee cannot purchase or deal in the trust property for his own benefit or on his own behalf, directly or indirectly. But such a purchase is not absolutely void. It is only voidable, and as it may be confirmed by the parties interested, directly, so it may be by long acquiescence or the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the **cestui que trust**."

Instances of the application of the doctrine in the lower Federal courts are numerous. See **Mercantile Trust Co.**

v. **Kanawha Ohio Railway Company**, 58 Fed., 6 (holder of receiver's certificates held precluded by three years' delay after confirmation of sale and distribution from asserting the priority of the lien of his certificates). In this case Taft, C. J., used language which has apt application to the facts in the case at bar:

> "If the holder of receiver's certificates were in court at the time of the entry of the decree of distribution, protesting against and excepting to the same, it seems perfectly manifest that his only recourse would be by appeal from the decree, and, on a failure to appeal, the decree would finally cut off his rights. The controversy would then have become res adjudicata. * * * Does the Adams Express Company, as a holder of receiver's certificates, stand in any better position than if it had been present by counsel in court when the final decrees of confirmation, release and distribution were entered, objected to the same? It is very clear that it does not. * * *
>
> It is said that the company had the right to await notice from the receiver before presenting its claims. We do not think so. If it relied on the receiver, it was a personal trust, in which it has been deceived and must bear the loss. It was its plain duty at an earlier day to advise the court of its claim against the receiver and the railroad. * * *
>
> For three years the company made no demand of any kind. This was laches of the grossest character, and entitles it to no consideration in a court of equity."

This doctrine is clearly applicable to the petitioner in the case at bar, which was a **party** to the foreclosure proceeding and chargeable with notice of all orders and proceedings of the court therein.

See also **Eiffert v. Craps** (C. C. A., 4), 58 Fed., 470 (laches imputed to one who failed to inspect a recorded

deed; here inspection of the record of the deed from Prudntial to Mary E. Johnston would have disclosed the face value of the revenue stamps).

In **Foster v. Mansfield C. & L. M. Railroad Co.**, 146 U. S., 88, 99, this court said:

> "The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

This case was a bill to set aside a foreclosure sale on the ground of fraud and collusion. It appeared that, in the interval between the sale and the filing of the suit "many of the witnesses, including both Cass and Scott, trustees, whose alleged fraudulent betrayal of their trust is the gravamen of this bill are dead." Many other cases in which delay has been held fatal on account of the death of material witnesses or the obscuration of evidence through failing recollection of witnesses are cited in Pomeroy's Equity Jurisprudence, 4th ed., Vol. 4, Section 1443, pages 3425, 3426.

Alternative remedies were open to the petitioner in this case. As suggested by the master, it could have obtained a citation to compel the receivers to file their accounts at an earlier date, proceeding in that respect as Mr. Ingalls and the receiver Florence undertook to do on the erroneous assumption that the originals were in the possession of the Prudential; it could have objected

to the confirmation of the sales; it could have brought suit to set aside the sales, even after confirmation, if it could have shown that knowledge of the facts on which it would predicate its claim had not come to or been available to it until after confirmation. Instead of promptly pursuing any of these available methods of enforcing their supposed rights, it voluntarily chose to wait until the receivers' substituted accounts were filed. If the gist of the petitioner's complaint is actual or constructive fraud on the part of the receiver Simkins and the Prudential, as hinted in the respondent's brief, other and more appropriate remedies are available to it.

So respondents respectfully submit that on this record petitioner has failed to show that it has been sufficiently diligent to entitle it to the equitable relief which it seeks. Both the special master and the Circuit Court of Appeals commented on petitioner's delay, lack of interest and acquiescence (R., 70, 393); but, as they found against the petitioner on the merits of its claims as regards Simkins, it was not necessary for either to predicate decision upon this laches.

CONCLUSION.

In conclusion, respondents submit that the material facts in this case have been found adversely to the contentions of the petitioner by the concurrent conclusions of the special master, the District Court and the Circuit Court of Appeals; that these conclusions are supported by substantial evidence in the record and should not be here disturbed; that the inferior tribunals have cor-

rectly applied the law to those facts, so far as the claims against the receiver Simkins are concerned (see the master's comprehensive and careful investigation and discussion of the authorities; R., 79 to 86, inclusive) and that the judgment of the Circuit Court of Appeals in that regard should be affirmed. Respondents further submit that under all the circumstances disclosed by the record the special master and the District Court, being fully advised, reached a sounder conclusion with respect to the matter of the division of fees than did the Circuit Court of Appeals when, on its own motion, it took disciplinary action in the premises; and that the judgment of the District Court in that regard ought to be affirmed.

Respectfully submitted,

CLARENCE D. LAYLIN,
16 E. Broad St., Columbus 15, Ohio,
Attorney for Respondents.

OSMER C. INGALLS,
9 E. Long St., Columbus 15, Ohio,
Of Counsel.

to the confirmation of the sales; it could have brought suit to set aside the sales, even after confirmation, if it could have shown that knowledge of the facts on which it would predicate its claim had not come to or been available to it until after confirmation. Instead of promptly pursuing any of these available methods of enforcing their supposed rights, it voluntarily chose to wait until the receivers' substituted accounts were filed. If the gist of the petitioner's complaint is actual or constructive fraud on the part of the receiver Simkins and the Prudential, as hinted in the respondent's brief, other and more appropriate remedies are available to it.

So respondents respectfully submit that on this record petitioner has failed to show that it has been sufficiently diligent to entitle it to the equitable relief which it seeks. Both the special master and the Circuit Court of Appeals commented on petitioner's delay, lack of interest and acquiescence (R., 70, 393); but, as they found against the petitioner on the merits of its claims as regards Simkins, it was not necessary for either to predicate decision upon this laches.

CONCLUSION.

In conclusion, respondents submit that the material facts in this case have been found adversely to the contentions of the petitioner by the concurrent conclusions of the special master, the District Court and the Circuit Court of Appeals; that these conclusions are supported by substantial evidence in the record and should not be here disturbed; that the inferior tribunals have cor-

rectly applied the law to those facts, so far as the claims against the receiver Simkins are concerned (see the master's comprehensive and careful investigation and discussion of the authorities; R., 79 to 86, inclusive) and that the judgment of the Circuit Court of Appeals in that regard should be affirmed. Respondents further submit that under all the circumstances disclosed by the record the special master and the District Court, being fully advised, reached a sounder conclusion with respect to the matter of the division of fees than did the Circuit Court of Appeals when, on its own motion, it took disciplinary action in the premises; and that the judgment of the District Court in that regard ought to be affirmed.

Respectfully submitted,

CLARENCE D. LAYLIN,
16 E. Broad St., Columbus 15, Ohio,
Attorney for Respondents.

OSMER C. INGALLS,
9 E. Long St., Columbus 15, Ohio,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 317.—October Term, 1943.

Crites, Incorporated, Petitioner,
vs.
The Prudential Insurance Company of America, Richard Simkins and George Florence.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 22, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

We granted certiorari in this case to determine certain important questions concerning the proper administration of federal receiverships.

Henry M. Crites and his wife, May R. Crites, executed mortgages in 1929 to the Prudential Insurance Company of America upon 22 parcels of adjoining farm property in Madison and Pickaway Counties, Ohio. Each mortgage, being in default, was matured by acceleration on December 30, 1931. On February 17, 1932, Prudential began 22 separate foreclosure proceedings against the Crites and Crites, Inc., the petitioner. Only the 11 proceedings relating to the 11 contiguous farms in Madison County, on which the mortgages aggregated $192,000, are now before us.

An involuntary petition in bankruptcy had been filed against Henry M. Crites. Petitioner is an Ohio corporation formed by Crites' creditors in an effort to salvage something from the farms. To it had been conveyed all the properties of the Crites, including the equities of redemption. Prudential requested that a receiver be appointed to take charge of the mortgaged farms pending the termination of the foreclosure proceedings. The District Court accordingly appointed as co-receivers the respondents Simkins and Florence "to collect the rents and proceeds of the real estate . . . to operate and manage said real estate through tenants, lessees, or otherwise, to rent and lease said real estate, to pay delinquent taxes and assessments and insurance premiums, to make such repairs as may be necessary to preserve the value of the premises and to produce normal income therefrom, and to do such other acts as may be from time to time ordered by the

court." Subsequent orders authorized them to borrow money from Prudential and from the local bank to pay necessary expenses relating to the farms and to execute leases of the farms upon a share or crop rental basis.

No answers to the foreclosure complaints were filed. In the hope that economic conditions would improve and bring about a higher sale value, the District Court allowed the receivers to operate the farms for a year before entering decrees *pro confesso* on May 2, 1933. By these decrees the mortgages and equities of redemption were declared foreclosed and the marshal was directed to sell each farm individually on July 1, 1933, at a public sale for cash at not less than two-thirds of the appraised value. The appraisers set the value of the 11 Madison County farms at $244,080, making $162,720 the minimum price at which they could be sold. The decree indebtedness in the 11 cases was $223,742.32. Prudential made the sole bids at the public sale on July 1 and secured title to the 11 farms for $163,900, slightly more than the upset price. The District Court confirmed this sale on July 18.

Prudential subsequently objected to the allowance of the receivers' claims on the ground that they were excessive. Petitioner also filed objections. Hearings were held before a special master. The District Court overruled petitioner's exceptions to the special master's report and its counterclaim, amended and approved the receivers' accounts, and affirmed the special master's report. Petitioner alone appealed, the court below affirming the action of the District Court with a slight modification as to additional fees for the receivers' attorneys. 134 F. 2d 925.

I.

Petitioner's first contention is that Simkins' actions in connection with the foreclosure sales constituted a breach of his duty as a receiver and rendered him accountable for certain profits made by him and others.

The evidence indicates that a Col. Proctor of Cincinnati was interested in purchasing the entire 11 Madison County farms as a unit and that he employed a real estate agent, Edwin Jones,[1] to represent him in the matter. Several weeks before the foreclosure sales, Jones visited Simkins and told him that he under-

[1] Jones was familiar with the 11 Madison County farms, having made an offer of $500,000 for them "a year or more" prior to 1933 on behalf of a New York principal. Crites rejected this offer, however.

stood that Simkins was one of the attorneys in the matter and that he was interested in buying the farms. Simkins, in addition to being one of the co-receivers, was an attorney who had represented Prudential in other foreclosure proceedings in Ohio and who had served Jones in a professional capacity on other matters. Simkins replied that "we are in no position to offer it right now, not in position until after the foreclosure proceedings and the Prudential Insurance Company acquires title for it, then they will be in position to offer it to anybody else trying to buy it." Simkins agreed, however, to intercede on Jones' behalf. They then drew up a contract whereby Simkins was to assist Jones in securing title to the 11 farms from Prudential after the latter had secured title by purchase at the public sale. The compensation of Simkins was dependent upon the success of the deal. Simkins did not know at this time the name of Jones' principal or how much the principal was willing to pay for the farms as a unit. Simkins then informed petitioner's counsel and the district judge that there "might be some parties interested" in the 11 farms as a unit, but was informed that they could not be sold as a group. It does not appear that he told counsel or the court that he had accepted employment from Jones.[2]

At Jones' request, Simkins conferred on June 25, 1933, with Prudential representatives concerning the possibility of purchasing the 11 farms from Prudential. No definite arrangements were then made, the representatives stating that they could not discuss terms until Prudential had bought the farms at the sale. On June 27 Jones submitted through Simkins a written offer of $249,106 to Prudential for the 11 farms, including "the company's undivided one-half interest in the growing corn crop thereon." The offer was witnessed by Simkins and another person and was enclosed in a letter which was addressed to one of Prudential's representatives and which was signed by Simkins. In this letter Simkins vouched for the responsibility of "Mr. Jones' buyer." Jones also enclosed a $30000 certified check in support of his offer. Simkins by this time clearly was aware of the identity of Jones' principal and of the terms of the offer to Prudential. But he made no effort to inform either the district judge or petitioner of these facts prior to or at the sale.

[2] Simkins testified that the fact of his employment by Jones "was no secret" and that "I may have told Judge Hough. I would not have hesitated in telling him."

At the public sale held by the marshal on July 1, Prudential made the sole bids and secured title to the 11 farms for a total sum of $163,900. Jones attended the sale but Col. Proctor had not authorized Jones to bid since he desired to buy only when he could be assured of securing all the 11 farms at once and when title to them was supported by a warranty deed from Prudential. Two days later, on July 3, Prudential accepted Jones' offer of $249,106.

Prudential then moved to confirm the public sales, giving due notice to petitioner of the hearing on the motion. At this hearing on July 18, objections to the motion "were suggested by reason of alleged commitments made by the plaintiff [Prudential] for the sale of certain of said properties, prior to public sale." It does not appear who made these objections or whether the petitioner's counsel was present. Harrison, one of the attorneys for the receivers, thereupon orally advised the judge of the terms and amount of Jones' offer and its acceptance by Prudential. At the judge's suggestion, Harrison set forth these facts in the form of an affidavit, which was later introduced at the hearing on the receivers' accounts. The court was not informed, however, as to Simkins' participation in the matter or as to the fact that Col. Proctor was the actual purchaser of the farms. Simkins was present in the court room at this time but said nothing. The judge confirmed the sales on the same day, July 18. Soon afterwards Prudential executed a warranty deed to Col. Proctor's nominee, the deed reciting a consideration of $249,106 but bearing tax stamps apparently indicating a substantially greater price.[3]

Simkins received a total of $2,797 from Jones, nearly all of which was in payment for his aid in consummating the purchase of the farms from Prudential.

On the basis of these facts, petitioner seeks to have Simkins surcharged with (a) all payments received by him from Jones for his assistance in consummating the resale of the farms to Col. Proctor; (b) the commission or profit received by Jones; and (c) the amount received by Prudential in excess of the decree indebtedness or, in the alternative, the amount by which the ap-

[3] Petitioner claims that the stamps indicate that Col. Proctor paid approximately $281,000, "presumably, $249,106 net to Prudential . . . and the difference of $31,894 to Jones." There was no proof, however, that Jones received that amount. He testified merely that he received $15,000 and an additional amount that he did not remember, from which amounts he paid Simkins

praised value of the farms exceeded the decree indebtedness. Petitioner claims that Simkins must be surcharged with these amounts because he breached his duty as co-receiver by accepting employment from Jones in advance of the foreclosure sales to help bring about a resale of the farms from Prudential to Col. Proctor. Respondents, on the other hand, resist this claim on the ground that Simkins was appointed co-receiver only to collect the rents and to operate the farms and had no fiduciary duty with respect to the foreclosure sales.

It is true that Simkin's official duties as co-receiver were limited to those conferred upon him by the court and that he had no authority to sell or to cause a sale of the farms in question. The foreclosure sales were conducted by the marshal under the direct supervision of the District Court and there was no evidence that Simkins unduly influenced the actual execution of the sales in any way. It is obvious, moreover, that Simkins was bound to perform his delegated duties with the high degree of care demanded of a trustee or other similar fiduciary. He was not free to deal with the property under his control as co-receiver in such a way as to benefit himself or his associates. Any profits that might have resulted from a breach of these high standards, including the profits of others who knowingly joined him in pursuing an illegal course of action, would have to be disgorged and applied to the estate. *Michaud* v. *Girod*, 4 How. 503; *Magruder* v. *Drury*, 235 U. S. 106; *Jackson* v. *Smith*, 254 U. S. 586.

But Simkins' conduct is not to be measured solely by the arbitrary dichotomy of functions relating to the conservation and liquidation of the farm properties. As a co-receiver in charge of collecting the rents and operating the farms, Simkins was also an officer or arm of the court. He was appointed to assist the court in protecting and preserving, for the benefit of all parties concerned, the properties in the court's custody pending the foreclosure proceedings. *Booth* v. *Clark*, 17 How. 322, 331; *Davis* v. *Gray*, 16 Wall. 203, 217-218; *Stuart* v. *Boulware*, 133 U. S. 78, 81; *Porter* v. *Sabin*, 149 U. S. 473, 479; *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 370-371. The court's authority and duties, however, covered all phases of the foreclosure proceedings. They included not only the conservation but the liquidation of the farm properties. The court had discretion to delegate these duties as it saw fit. But whatever the functional distribution, all the court officers were bound to act fairly and openly with respect to

every aspect of the proceedings before the court. The mere fact that any one aspect did not fall within the delegated function of a particular court officer did not give that officer free rein to act in a secret, non-judicial manner as to that aspect. The court, as well as all the interested parties, had the right to expect that its officers would not make undisclosed private agreements, fail to reveal any pertinent information or use their official position for their own profit or to further the interests of themselves or any associates.

It is impossible to reconcile the activities of Simkins relating to the foreclosure sales with the basic standard of conduct demanded of him as an officer of the court. One of the prime purposes of the foreclosure proceedings was to obtain enough money from the farm properties to pay in full the mortgage indebtedness, with any surplus going to the owner of the equities of redemption. All information to that end which came to Simkins or to any other court officer belonged to the court and to the parties interested in the foreclosure proceedings. Here Simkins had knowledge of a prospective purchaser of the farms who was willing to pay more than the mortgage indebtedness on the properties. Yet he made no effort to reveal this important information prior to the foreclosure sales other than to state that there "might be some parties interested" in buying the 11 farms as a unit. He was told that the court could not order a public sale of the farms as a unit. But it is clear that the court and petitioner might well have profited if Simkins had more fully revealed to them in advance of the sales that there was a prospect of selling all 11 farms to a responsible buyer at an advantageous price. Petitioner could well have been given the opportunity to bargain directly with Col. Proctor for a private sale of the farms as a unit.[6] This suppression of vital information was in no way mitigated by the partial revelation of the facts at the hearing on the motion to confirm the sales to Prudential, after Prudential had accepted the resale offer, or by any subsequent knowledge obtained by petitioner. The information was most valuable prior

[6] The special master and the court below found that Col. Proctor was interested in purchasing the 11 farms as a unit only if he could obtain a warranty deed from Prudential. But there was no evidence that petitioner could not have furnished muniments of title equally satisfactory to Col. Proctor or that he would not have been satisfied with a warranty deed from petitioner. According to Jones, Col. Proctor "said a general warranty deed from the Prudential Insurance Company was good enough for him."

of the foreclosure sales when the prospects were greater for successful bargaining, and it should have been divulged at that time. Moreover it was inconsistent with his position as an officer of the court for Simkins to make a secret arrangement with Jones to bring about, by active intervention, a resale of the properties in the custody of the court. The fact that he was not a liquidating receiver did not absolve him of the duty to act openly at all times with respect to the subject matter of the proceedings. Due regard for his official position demanded that he at least notify and obtain the approval of the court and of the interested parties before entering into an employment contract with a third party wherein his compensation was dependent upon a particular bidder being successful at the foreclosure sales. This arrangement brought out in even bolder relief the reprehensibleness of Simkins' failure to disclose all the facts regarding Col. Proctor's interest in purchasing the farms. Had such facts been revealed prior to the public foreclosure sales, Prudential might not have obtained title to the farms and Simkins would not have earned any compensation under his contract with Jones. It was thus to Simkins' personal benefit not to disclose all the pertinent facts.

Since the course taken by Simkins was one which he as an officer of the court could not legally pursue and since profits resulted to him, the law makes him accountable to the trust estate for all such profits. Cf. *Magruder* v. *Drury*, *supra*; *Jackson* v. *Smith*, *supra*. We need not speculate as to whether his conduct operated to dampen the foreclosure sales to any appreciable degree or whether the estate was in any other way injured. It is enough that his activities had a tendency to dampen the sales. For that reason alone he may be held to forfeit all profits he derived from his misconduct, regardless of whether it actually had an adverse effect or not. In this type of situation "the incidence of a particular conflict of interest can seldom be measured with any degree of certainty." *Woods* v. *City National Bank & Trust Co.*, 312 U. S. 262, 268. Proof of profits resulting from an irregular or conflicting course of conduct is sufficient. Simkins was thus accountable for the payments received by him from Jones for his assistance in consummating the resale of the farms from Prudential to Col. Proctor.[7]

[7] It is unnecessary to consider petitioner's argument relating to the sale to Prudential of the growing crops on the farm lands, inasmuch as petitioner seeks to surcharge Simkins with the same amounts as in connection with the

Under the circumstances of this case, however, Simkins was not surchargeable with the commission received by Jones, with any amount received by Prudential or with the amount by which the appraised value of the farms exceeded the decree indebtedness. We perceive no basis in this record for holding Simkins responsible for any possible misconduct on the part of Jones or Prudential or for any profits that they may have obtained thereby. We do not, of course, determine in this proceeding whether petitioner could recover any such profits in a direct action against either Jones or Prudential.

II.

Petitioner also claims that Simkins should be surcharged with all his receivership fees because of a fee-splitting arrangement which he made with Harrison and Ingalls, the attorneys for the co-receivers as well as for Prudential. The three agreed to pool the fees allowed them by the District Court and to divide them equally, although this arrangement apparently was not completely carried out.

Petitioner excepted to all credits in the receivers' accounts for fees to either Simkins or Ingalls because of this arrangement. The court below allowed credit to the receivers for the $250 fees received by Harrison and Ingalls from the court as preliminary compensation and for all out-of-pocket expenses incurred by the two attorneys on behalf of the estate. But all credits were denied for additional attorney fees paid to them. Petitioner objects to the failure to disallow the $250 fee allowed Simkins by the District Court and the additional $1,800 fee which he paid to himself on account of his services as co-receiver.

A fee-splitting arrangement of this nature is clearly unenforceable and void as against public policy. *Weil v. Neary*, 278 U. S. 160. But whether the parties to such a contract should be allowed any fees at all and if so the amount thereof, are normally matters within the sound discretion of the District Court and are not reviewable except where a clear abuse of discretion is apparent. In this case, however, the fact that Simkins entered

sale of the lands and no different considerations are present. Respondents claim that petitioner is barred from relief because of laches is without merit. Nothing in the record indicates that petitioner discovered the full facts concerning Simkins' activities until several years after the foreclosure sales. Petitioner then made timely exceptions to the receivers' accounts.

into a fee-splitting contract so patently illegal, plus the fact that he engaged in other misconduct and indiscretions incompatible with his position as an officer of the court, compel the conclusion that all fees and compensation as co-receiver should have been denied him. Cf. *Woods* v. *City National Bank & Trust Co.*, *supra*, 268.

The judgment of the court below is reversed and the cause is remanded for further proceedings consistent with this opinion.

Mr. Justice ROBERTS.

I am of opinion that certiorari should not have been granted in this case and that the writ should be dismissed.

The Circuit Court of Appeals recognized established principles in determining to what extent the respondent Simkins should be denied compensation for services by reason of his acting in inconsistent relations. That court canvassed authorities which this court cites in its opinion and not only did not refuse to follow and apply them but, as I think, in perfect good faith, proceeded to examine and appraise the facts and circumstances in order to apply the relevant legal principles.

There is not a suggestion of any conflict amongst the federal courts respecting the law which should govern decision nor is there any suggestion that, on an identical set of facts, any federal court has reached a result contrary to that reached by the court below. In essence, the case presents the question whether the action taken by the Circuit Court of Appeals was sufficiently drastic in the circumstances disclosed.

I think it plain that this case falls within the category to which I referred in *Bailey* v. *Central Vt. Ry. Co.*, 319 U. S. 350, 354. All the considerations there mentioned apply equally here. If this court is to spend its time correcting mistakes in the appraisal of facts in individual cases by courts below the performance of its essential functions necessarily will suffer.